IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:- 17.07.2007

Coram:-

The Hon'ble Mr. Justice R.REGUPATHI

Criminal Appeal No.805 of 2003

Silvester ... Appellant/Accused.

vs.

The Inspector of Police,
V-6 Kolathoor Police Station,
Kolathoor, Chennai. ... Respondent/Complainant.

Appeal filed under Section 374 CPC against the judgment of the Sessions Judge, Magalir Neethimandram at Chennai, dated 06.02.2003, passed in S.C. No.168 of 2002.

For Appellant : Mr.P.Selvaraj
For Respondent : Mr.Hasan Mohamed Jinnah,
Govt. Advocate (Crl. Side)

J U D G M E N T

The appellant/sole accused in this case was convicted by the learned Sessions Judge, Magalir Neethimandram at Chennai, for the offence punishable under Section 376 read with Section 511 IPC and sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.2,000/-, in default, to undergo simple imprisonment for a period of three months. Aggrieved by the same, the present appeal has been field before this court.

2. The case of the prosecution is that, on 17.09.2001 at 1 P.M., PW-2/victim girl, aged about 8, was returning from school and at that time, the accused, by stating that she was called by her grandmother, took her to his house and after removing her undergarment, forcibly committed rape on her. Before trial court, the prosecution, in order to substantiate its case, examined PWs-1 to 8, marked Exs. P1 to P8 and produced MOs.1 to 4.

3. PW-1 is the mother of the victim girl. It is her evidence that on 17.09.2001, she saw her daughter returning from the school weeping and found her dress stained with blood. On enquiry, complaining pain in the private part, PW-2 told that the accused, at the time when she was

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returning from school, took her to his residence and after removing his undergarment and that of her, committed rape. Immediately, PW-1 accompanied by PW-2 went to the police station and gave a complaint under Ex.P-1 to PW-8, the Inspector of police.

PW-2 is the victim girl. She has stated that, when she was returning from school, the accused took her to his residence by stating that she is called by her grand mother and, after removing her undergarment and that of the accused, he pressed his penis into her private part.

PW-3 is the mahazar witness, who attested the statement given by the accused at the time of his arrest on 20.09.2001, and the admissible portion of the said statement is Ex.P-2. In the presence of PW-3, the Inspector seized MOs-1 and 2, half pant and undergarment, from the accused.

PW-4 is a neighbour, who has stated that PW-1 was enquiring PW-2 on her return from school as to why she was weeping, for which, she told that the accused committed rape on her. He has also accompanied PW-1 to the Police Station.

PW-5 is the Medical Officer, who examined the victim on the same day at 4 P.M. and stated that she could not find any injury on the body of PW-2 including private part. She has further stated that no mark of violence could be seen on the body of the victim. Ex.P-4 is the Accident Register and Ex.P5 is the medical report given by her.

PW-6 is the Medical Officer, who examined the accused on 22.09.2001. He has given certificate regarding the virility of the accused. PW-7 is the Forensic Expert, who has issued Ex.P7 Report, wherein, as regards item No.3-half pant, it is stated 'a torn faded brown silken shorts on which were dark brown stains'. In the 'Note', it is mentioned 'Serology report will be sent separately'.

PW-8 is the Inspector of Police. On 17.09.2001 at 2.30 P.M., he received a complaint from PW-1 accompanied by PW-2, and registered Crime No.1179 of 2001 for an offence punishable under Section 376 IPC. He enquired the victim and seized MO-3 frock and MO-4 undergarment from her under Form-95. He sent the victim to K.M.C. Hospital through a Constable with a Memo for treatment and examination. He Prepared observation mahazar and examined other witnesses. On 20.09.2001, at 10 A.M., he arrested the accused and recorded a statement from him. At that time, the accused produced half-pant and undergarment in the presence of witnesses and the Inspector seized the same. He enquired the Medical Officers, who examined the victim as well as the witnesses. He forwarded the material objects for getting opinion from the forensic experts. On conclusion of the investigation, final report was filed by him for an offence under section 376 IPC.

4. The accused was questioned under Section 313 Cr.P.C. with reference to the incriminating materials available against him, for which, he pleaded innocence. Neither oral nor documentary evidence was adduced on the side of the appellant/accused. The learned trial Judge, perusing the materials and considering the arguments advanced on either side, convicted and sentenced the accused as aforementioned.

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5. Learned counsel for the appellant submits that the evidence of PW-1/mother of the victim to the effect that she noticed swelling on the private part and also blood oozing therefrom has not been corroborated by the Medical Officer PW-5. He points out that PW-5 did not notice any swelling on the private part or blood oozing therefrom; and further, she has given a positive opinion that the victim was not subjected to forcible intercourse/rape. According to him, the conclusion of the trial court that the accused made an attempt to commit rape is farfetched. It is further submitted that even accepting the evidence of PWs-1 to 4, it only appears that the accused took PW-2 to his residence and made an attempt to outrage her modesty; that being so, in the absence of positive materials to come to a definite conclusion that there was an attempt to commit rape, at the most, the appellant could be convicted under Section 354 IPC. Pointing out that the appellant was arrested pending investigation on 20.07.2001; enlarged on bail on 08.11.2001; after conviction by the trial court, was sent to judicial custody on 06.02.2003; and was in confinement until this Court enlarged him on bail on 28.06.2003; thus, all put together, he was in custody for 254 days, ie., 8 ½ months, learned counsel pleads that the period of imprisonment already undergone by the appellant may be taken into consideration and leniency may be shown.

6. Per contra, learned Government Advocate submits that in a case of rape and attempt to commit rape, evidence of the victim assumes great importance. In the instant case, while deposing before Court, the victim, who was aged 8, has given a graphic picture about the way in which she was subjected to violence. She also narrated the incident to her mother, who, without any lapse of time, intimated the same to the police. The lower court, after considering various aspects of the case, has arrived at a just conclusion; hence, the the order passed by it may not be disturbed.

7. I have perused the materials available on record and considered the submissions advanced by both sides. No doubt, in a case of rape or attempt to rape, the evidence of the victim assumes great importance. At the same time, it is the duty of the court to see that the same is corroborated by medical evidence so as to base conviction against the accused under Section 376 IPC. From the evidence of PWs-1 to 4, though it appears that the victim has been taken by the appellant to his residence and thereafter subjected to rape, the same is not corroborated by medical evidence. On a careful perusal of the medical evidence, this Court is unable to come to the conclusion that the appellant attempted to commit rape on the victim. It is the positive evidence of the mother of the victim that she noticed swelling on the private part of PW2 and blood oozing therefrom. She noticed the same between 12.30 and 1 P.M. on the occurrence day. The Medical Officer also examined the victim without further lapse of time on the same day. By stating that she could not find any external injury and bleeding from the private part of PW-2, she has opined that the victim was not subjected to violence. The Medical Officer PW-6, who examined the appellant, has not noticed any injury on

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the private part of the appellant. In her evidence, the victim, though stated that she cried unable to bear the pain, also stated that she did not bleed at that time. She has further stated that she did not experience pain when the Doctor examined her. At the tender of age of 8, PW-2 might not have been aware of the concept of sex. On an overall assessment of the materials available on record, I am of the view that the offence of attempt to rape is not substantiated, however, accepting the prosecution version on other aspects, a safe conclusion can be arrived at that the accused has committed an offence punishable under Section 354 IPC. The said Provision reads as follows:-

> " 354. Assault or criminal force to woman with intent to outrage her modesty.-- Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

8. In the result, the order of conviction and sentence passed by the trial court against the appellant/accused for the offence punishable under Section 376 read with 511 IPC is set aside, instead, he is convicted under Section 354 IPC. Considering the facts and circumstances, the period of imprisonment already undergone by the appellant is treated as the sentence for the offence under Section 354 IPC.

9. With the above modification, the appeal is allowed in part.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

JI.

To

1. The Sessions Judge, Magalir Neethinmandram, Chennai.
2. The The Inspector of Police, V-6, Kolathoor Police Station, Kolathoor, Chennai.
3. The Public Prosecutor, High Court, Madras.
+ 1 CC To Mr. P.Sevaraj, Advocate SR NO.43749

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